STATE OF MICHIGAN

COURT OF APPEALS

GARY BLONDE,

Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,

and

DAVID MARCUSSE,

Counter-Defendant-Appellant/Cross-Appellee,

v

RUTH S. LONG and BRYAN KELLY DUGAN,

Defendants/Counter-Plaintiffs-Appellees/Cross-Appellants,

and

TRINITY SOLUTIONS SERVICES, INC. and WHOLE PROPERTIES, L.L.C.,

Defendants/Counter-Plaintiffs-Appellees,

and

JOHN DAVID MARCUSSE and RALPH WILBUR,

Defendants.

UNPUBLISHED
January 28, 2014

No. 304653
Missaukee Circuit Court
LC No. 2008-007165-CZ

GARY BLONDE,

Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,

and

DAVID MARCUSSE,

Counter-Defendant-
Appellant/Cross-Appellee,

v

RUTH S. LONG,

Defendant/Counter-Plaintiff-
Appellee/Cross-Appellant,

No. 307982
Missaukee Circuit Court
LC No. 2008-007165-CZ

and

BRYAN KELLY DUGAN,

Defendant/Counter-Plaintiff-
Appellee/Cross-Appellee,

and

TRINITY SOLUTIONS SERVICES, INC. and
WHOLE PROPERTIES, L.L.C.,

Defendants/Counter-Plaintiffs-
Appellees,

and

JOHN DAVID MARCUSSE and RALPH
WILBUR,

Defendants.

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

This case arises out of an attempt by plaintiff, Gary Blonde, to raise a soybean crop on real property in Missaukee County associated with an oral sharecropper's agreement. In Docket No. 304653, plaintiff appeals as of right from the trial court's judgment, following a jury trial, awarding plaintiff damages of $24,037.04 against defendant, Bryan Dugan, and $3,304.96 against defendant, Ruth Long, on plaintiff's claim for breach of contract. Plaintiff challenges the trial court's pretrial decision granting defendants' motion for summary disposition of plaintiff's

claim for treble damages under MCL 600.2918(1). Dugan and Long[1] cross-appeal the trial court's decision denying their motion for a directed verdict on the breach-of-contract claim. In Docket No. 307982, plaintiff appeals as of right from the trial court's order imposing case-evaluation sanctions against Dugan but not Long. Long cross-appeals from an order awarding case-evaluation sanctions in favor of counter-defendant, David Marcusse. We affirm in both appeals.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Long owns property in Missaukee County upon which the soybean crop in dispute was planted. Dugan was a lessee of the property. David is an independent contractor who worked for plaintiff. Plaintiff alleges that he contracted with John Marcusse, acting as an agent of Long and Dugan, to plant and harvest a soybean crop on the property. After plaintiff planted the soybean crop, defendants disputed John's authority to contract on their behalf. They accused plaintiff of trespassing and informed him that he did not have their permission to enter the property or remove any crops. When efforts to resolve the matter amicably were not successful, plaintiff filed this action asserting a contractual right to the soybean crop. Defendants denied that John had authority to enter into a sharecropping contract on their behalf, filed a counterclaim against plaintiff for trespass, and designated David as a counter-defendant in their action for trespass. Plaintiff later added as defendants Dugan's corporate entities, Trinity Solutions Services, Inc. and Whole Properties, L.L.C., and also added Ralph Wilbur and John as individual defendants.

Plaintiff's second amended complaint asserted several different theories of liability against defendants related to John's authority to bind defendants to a contract. In a pretrial ruling, the trial court granted summary disposition in favor of defendants on plaintiff's claims involving whether John had apparent or implied authority to enter into a contract with plaintiff with respect to the property. The court also granted defendants' motion for summary disposition with respect to plaintiff's claim for treble damages under MCL 600.2918(1). The case proceeded to trial on plaintiff's breach-of-contract claim based on John's alleged actual authority to enter into a sharecropping contract with plaintiff and also on defendants' trespass claim against plaintiff and David. The jury returned a verdict in favor of plaintiff on his breach-of-contract claim, obviating the need to consider defendants' counterclaim for trespass. The trial court entered a judgment in accordance with the jury's verdict and awarded plaintiff $24,037.04 against Dugan and $3,304.96 against Long.

Plaintiff and David then moved for case-evaluation sanctions against Long and Dugan. The trial court determined that David was entitled to sanctions against both defendants but that plaintiff was entitled to sanctions only against Dugan. Following an evidentiary hearing, the trial court awarded total sanctions of $4,740, to be apportioned 25 percent to David against Long and Dugan jointly and severally, and 75 percent to plaintiff against only Dugan. The court denied

[1] This opinion refers to Dugan and Long collectively as "defendants" but individually by their name. The remaining defendants are referred to by name.

plaintiff and David's motion for supplemental case-evaluation sanctions for attorney fees incurred after July 15, 2011.

II. DOCKET NO. 304653

A. PLAINTIFF'S CLAIM FOR TREBLE DAMAGES UNDER MCL 600.2918(1)

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition on plaintiff's claim for treble damages under MCL 600.2918(1). We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Summary disposition is appropriate under MCR 2.116(C)(10) "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). The trial court must consider "the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial." *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 426; 770 NW2d 105 (2009). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This issue also involves the interpretation and application of a statute, which is also subject to de novo review. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). When statutory language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (internal citations and quotations omitted).

The version of MCL 600.2918 in effect at all times relevant to the lower-court proceedings provided as follows, in pertinent part[2]:

> (1) Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, if he prevails, is entitled to recover 3 times the amount of his actual damages or $200.00, whichever is greater, in addition to recovering possession.
>
> (2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the amount of his actual damages or $200.00, whichever is greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:
>
> (a) The use of force or threat of force.

[2] The statute was amended by 2013 PA 127, with only minor stylistic changes to subsections (1) and (2).

(b) The removal, retention, or destruction of personal property of the possessor.

* * *

(3) The provisions of subsection (2) shall not apply where the owner, lessor, licensor, or their agents can establish that he:

(a) Acted pursuant to court order . . . .

The trial court determined that there was no genuine issue of fact whether defendants forcibly expelled plaintiff from the property because plaintiff acceded to Long's demand that he refrain from entering the property out of concern that Long would sue him for trespass. Plaintiff contends that the trial court erroneously disregarded his legal status as a sharecropper on the property in its analysis of plaintiff's reasons for abandoning the crop.

The purpose of MCL 600.2918, which is sometimes referred to as "the antilockout law," is to abrogate a landowner's right to self-help and to require a landowner to "resort to judicial process to recover possession" from a tenant wrongfully in possession. *Deroshia v Union Terminal Piers*, 151 Mich App 715, 717; 391 NW2d 458 (1986). The Court in *Deroshia* explained the historical context of MCL 600.2918(1) as follows:

> At common law a landlord could use reasonably necessary force to remove a holdover tenant or other unauthorized occupant of his land. See Practice Commentary to MCLA 600.2918. However, this rule was very early modified by statute to prohibit *forceful* entry by the landlord, in the interest of protecting the peace. The forcible entry and detainer statute has remained unchanged in substance and is incorporated as subsection (1) of the present antilockout law, MCL. 600.2918; MSA 27A.2918.
>
> * * *
>
> The statute was held to prohibit forceful self-help regardless of whether or not the tenant was in rightful possession of the premises. *Gallant v Miles*, 200 Mich 532; 166 NW 1009 (1918).
>
> The statute was amended in 1977 to add a subsection eliminating self-help altogether even where not forceful except in certain narrowly defined circumstances[.] [*Id.* at 718 (emphasis in original).]

In this context, plaintiff's reliance on his contractual right to grow soybeans on the property is not material to the central question under subsection (1). Under subsection (1), it is the manner in which a plaintiff is removed from the land, not his legal right to possession of the land, that is relevant to entitlement to treble damages. Accordingly, the only material issue is whether defendants used force to oust plaintiff from, or keep plaintiff off, the property. Plaintiff relies on evidence of threats made at the September 6, 2008, meeting, and in November 2008, when Wilbur and Long approached plaintiff away from the property and threatened to wait at the property with a shotgun if plaintiff attempted to harvest the soybeans. Plaintiff avoided the

property after Long warned him by correspondence in early August 2008 that she would take legal action if he attempted to harvest the soybeans. After Long sent those letters, plaintiff's only involvement with the soybean crop was to arrange for pesticide spraying with Dugan's knowledge and consent. There was no forceful and unlawful ejection of plaintiff from the property. Wilbur's subsequent threatening conduct occurred after plaintiff had already acceded to Long's instructions to stay away.

Plaintiff argues that the trial court's decision was based on the erroneous assumption that plaintiff was not a tenant under the alleged contract and that plaintiff did not have actual possession of the property without a valid lease. Again, however, the material issue under MCL 600.2918(1) is not plaintiff's reasons for his occupation of the land but the reasons he gave up that occupation. The significance of the threats by Long and Wilbur to plaintiff is not altered by plaintiff's possessory status or any party's belief about plaintiff's possessory status. The only material issue is whether plaintiff can establish a question of fact regarding whether defendants used force to oust him from the property or keep him from entering afterward. As previously discussed, there was no evidence of any forceful and unlawful ejection of plaintiff from the property.

Plaintiff offers the theory that defendants fraudulently persuaded him that John had no authority to enter into the sharecropping contact, which caused him to leave the land. Plaintiff argues a theory of being ejected by fraud and then kept out by threat of force. Although plaintiff's ejection-by-fraud theory arguably fits subsection (2) of MCL 600.2918, subsection (2) does not provide for treble damages for a fraudulent ejection from property. Plaintiff cites *McIntyre v Murphy*, 153 Mich 342; 116 NW 1003 (1908), in support of his argument that defendants' reliance on "stratagem," i.e., fraud, to effect plaintiff's departure from the property supports his claim under MCL 600.2918(1). In *McIntyre*, 153 Mich at 343, the plaintiff purchased residential property from the defendant on a land contract and failed to make an installment payment. The defendant and four men entered the plaintiff's home when the plaintiff was sick in bed and removed most of the personal property from the house. *Id.* at 343. The plaintiff sued the defendant pursuant to the predecessor anti-lockout statute, 1897 Comp laws, § 11.153,[3] and received a directed verdict in her favor. *Id.* at 344. The Supreme Court rejected the defendant's argument that there was no forcible entry and quoted *Seitz v Miles*, 16 Mich 456 (1868), as follows:

> "[I]t is not necessary that the actual invasion of the premises should at the very moment be attended by the circumstances requisite to give it the character of a forcible entry, or be accompanied by threats, actual force, or violence, or any conduct which would constitute a breach of the peace; but if the entry be obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in having entered to have been the expulsion of the party in

[3] The former statute provided that "[n]o person shall make any entry into lands, tenements or other possessions, but in cases where entry is given by law; and, in such cases, he shall not enter with force, but only in a peacable manner." *McIntyre*, 153 Mich at 344.

> possession, and it is followed up by actual expulsion by means of personal threats or violence, or superior force, it will amount to a forcible entry." [*Id.* at 345-346, quoting *Seitz*, 16 Mich 456 (internal quotation marks omitted).]

Plaintiff's reliance on *McIntyre* is misplaced because that case was decided under a predecessor statute that differs from the current version of MCL 600.2918(1). Plaintiff acknowledges that the current statute changes the focus from illegal "entry" and "detention" to a person being "put out" or "kept out" of land by force, but he argues that the concept of "entry by stratagem" recognized in *McIntyre* should also be recognized in MCL 600.2918(1). We disagree. The plain language of MCL 600.2918(1) confines the statute's application to forcible and unlawful ejections, with no suggested application to fraudulent representations.

Accordingly, because there was no evidence of any forceful and unlawful ejection of plaintiff from the property, the trial court did not err by dismissing plaintiff's claim for treble damages under MCL 600.2918(1).

B. DEFENDANTS' CROSS-APPEAL

Defendants cross-appeal the trial court's denial of their motion for a directed verdict on plaintiff's claim for breach of contract. We review de novo a trial court's decision on a motion for a directed verdict. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). This Court must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Id.* A directed verdict may be granted "[o]nly if the evidence, when viewed in this light, fails to establish a claim as a matter of law . . . ." *Id.*

Over the course of this litigation, plaintiff asserted various theories about John's authority to bind defendants to a sharecropping contract with plaintiff. By the time of trial, plaintiff's only remaining theory was that John, as an agent for both Long and Dugan, had the actual authority to enter into a sharecropping contract on defendants' behalf.

"An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal." *Stratton-Cheeseman Mgt Co v Dep't of Treasury*, 159 Mich App 719, 726; 407 NW2d 398 (1987) (quotation marks and citations omitted). "An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992), citing 1 Restatement Agency, 2d, § 15, p 82. In *Meretta*, 195 Mich App at 698, this Court explained the sources of an agent's authority:

> The authority of an agent to bind the principal may be either actual or apparent. Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses. After the agency relationship and the extent of the agent's authority have been shown, the principal has the burden of proving that the agent's authority was limited. 3 Am Jur 2d, Agency, § 359, p 870.

"Any question relating to the existence and scope of an agency relationship is a question of fact." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

Here, John testified at trial that he contacted both Dugan and Long to discuss plaintiff's proposal. He testified that Long told him that she expected Dugan to plant corn on the property as part of her crop-rotation plan and that plaintiff's alternative plan of planting soybeans was acceptable to her. John also testified that Dugan told him, albeit in an offhand manner, that he agreed with plaintiff's soybean plan and instructed John to "make it happen." This testimony, if believed, was sufficient to enable the jury to find that John had actual authority to make a sharecropping contract with plaintiff on defendants' behalf. Defendants' status as undisclosed principals in relation to plaintiff did not deprive John of authority to enter into the contract. The consequence of undisclosed principals is that the agent may be liable as a party to the contract, not that the principals are relieved of their obligation. *Timmerman v Bultman*, 243 Mich 344, 347-348; 220 NW 754 (1928); *Penton Publishing, Inc v Markey*, 212 Mich App 624, 626; 538 NW2d 104 (1995); see also *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 147; 314 NW2d 453 (1981) ("Where an agency relationship exists, a plaintiff's knowledge of the agency is not necessary to hold the principal liable for the agent's actions which are within the scope of his authority.").

Defendants argue that John's testimony regarding the dates of his contacts with plaintiff and defendants in May and June 2008 was inconsistent. This argument pertains only to John's credibility, which is to be determined by the trier of fact after hearing John's testimony. *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008) (citation and internal quotations omitted). When deciding defendants' motion for a directed verdict, the trial court was required to resolve credibility issues in plaintiff's favor. See *Krohn*, 490 Mich at 155. The trial court did not err by denying defendants' motion for a directed verdict.

We also reject defendants' argument that plaintiff was improperly permitted to introduce new theories of liability for breach of contract. Plaintiff pursued the pleaded theory that John acted with the actual authority of Long and Dugan when he entered into the sharecropping agreement with plaintiff, and the jury based its verdict on that theory.

III. DOCKET NO. 307982

Plaintiff raises several issues regarding the trial court's order of case-evaluation sanctions under MCR 2.403(O). The interpretation and application of a court rule presents a question of law subject to de novo review by this Court. *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

The case-evaluation panel issued a single award of $24,000 on plaintiff's breach-of-contract claim against defendants. Plaintiff accepted the case-evaluation award, but both Long and Dugan rejected it. The jury returned a verdict of $3,304.96 against Long and $24,037.04 against Dugan. The trial court determined that Dugan was liable to plaintiff for case-evaluation sanctions but declined to order case-evaluation sanctions to plaintiff against Long because she had improved her position at trial. Plaintiff now argues that Long's liability for case-evaluation sanctions should have been based on the aggregate amount of the two verdicts against her and Dugan. We disagree.

MCR 2.403(O) governs liability for case-evaluation sanctions for parties who reject a case-evaluation award. The rule provides, in pertinent part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> * * *
>
> (3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.
>
> (4) In cases involving multiple parties, the following rules apply:
>
> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.
>
> (b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant.

Plaintiff's argument that the trial court was required to consider the aggregate verdicts against Long and Dugan in determining Long's liability for case-evaluation sanctions is based on the erroneous contention that Long and Dugan were jointly and severally liable for both verdict amounts. They were not. Our Legislature has abolished joint and several liability in tort actions, but parties to a contract may agree to impose joint and several liability on themselves. In *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 642; 734 NW2d 217 (2007), this Court held that two tenants who signed a lease agreement listing them as "jointly severally" were jointly and severally liable for damages to the premises caused by one of the tenants. Here, there was no contractual agreement that Long and Dugan would be jointly and severally liable to plaintiff for any breach of the sharecropping agreement. Moreover, the jury verdict form, which plaintiff did

not object to, clearly contemplated imposition of separate and distinct liability for each defendant, and the jury returned separate damage awards against each defendant.

We note that under MCR 2.403(K)(2), the case-evaluation panel was required to "include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action." Neither the trial court nor the parties addressed this deficiency until after the trial, when plaintiff moved for case-evaluation sanctions. If plaintiff believed that separate case-evaluation awards should have been issued with respect to each defendant for purposes of evaluating their potential liability for sanctions, rather than basing each defendant's liability for sanctions on the case-evaluation award of $24,000, plaintiff should have filed an appropriate motion to address this issue before trial. Because plaintiff did not do so, and because plaintiff did not object to the jury verdict form that permitted the jury to return separate damage awards against each defendant, the trial court did not err in evaluating each defendant's liability for case-evaluation sanctions on the verdict amount against each defendant.

Plaintiff also argues that the trial court erred by basing its attorney-fee award on the discounted $30 hourly rate that plaintiff's counsel charged rather than the prevailing rate in the community or counsel's usual hourly rate. We do not agree.

The trial court's determination of a reasonable attorney fee is reviewed for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 239-240; 770 NW2d 47 (2009). "If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

In *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), our Supreme Court held that an attorney-fee award must be reasonable and that reasonableness is determined according to the following factors set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Wood*, 413 Mich at 588, quoting *Crawley*, 48 Mich App at 737.]

The Court agreed "that there is no precise formula for computing the reasonableness of an attorney's fee." *Id.* The Court also stated that a court awarding attorney fees "is not limited to those factors in making its determination" and that "the trial court need not detail its findings as to each specific factor considered." *Id.* The Court concluded that an "award will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion." *Id.*

In *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), a two-justice plurality (TAYLOR, C.J., and YOUNG, J.), joined by two concurring justices (CORRIGAN, J., and MARKMAN, J.) clarified the statement in *Wood* that the trial court was not required to make detailed findings regarding each specific factor. The lead opinion states "that in order to aid appellate review, the court should briefly address on the record its view of each of the factors." *Id.* at 529 n 14. The lead opinion also states that the factors set forth in MRPC 1.5(a) are relevant to determining a reasonable attorney fee and overlapped the *Wood* factors. *Id.* at 529-531. MRPC 1.5(a) lists these eight factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [*Id.* at 530, quoting MRPC 1.5(a).]

The lead opinion in *Smith* states:

> We conclude that our current multifactor approach needs some fine-tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Id.* at 530-531.]

In *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 232-235; 823 NW2d 843 (2012), this Court held that the trial court's determination of a reasonable attorney fee was erroneous, in part, because the court relied on unreliable anecdotal evidence of the

prevailing fee in the market and disregarded evidence that the prevailing parties' counsel charged a reduced rate. Citing *Smith*, 481 Mich at 534, the *Van Elslander* Court stated that "the goal of awarding attorney fees under MCR 2.403 is to reimburse a prevailing party for its reasonable fee; it is not intended to 'replicate exactly the fee an attorney could earn through a private fee arrangement with his client." *Id.* at 231 (internal quotations omitted). This Court held:

> In defining what constitutes a reasonable attorney fee, the *Smith* Court emphasized that a "reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work." "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." Consequently, the actual fee charged, while clearly not dispositive of what constitutes a reasonable fee, is a factor to be considered in determining market place value as it is reflective of competition within the community for business and typical fees demanded for similar work. The trial court specifically rejected any consideration of "referral appreciation discounts," "attractive rates to entice future business," and "familiar relationships" as extraneous to a determination of what constitutes a reasonable fee. Yet such considerations are factors in determining what constitutes a "fee customarily charged in the locality for similar legal services." Such discounts are reflected in the rates charged by attorneys "of similar ability and experience in the community," and are reflective of what is "normally charge[d]" to paying clients. [*Id.* at 233-234, quoting *Smith*, 481 Mich at 530-533 (internal quotations omitted).]

The Court held that the prevailing defendants' retainer agreement provided hourly rates of $250 for a partner and $185 for an associate, which were lower than the firm's usual charges. The rates were reduced in order to "accommodat[e] the referral source for this client and because the client was paying out of pocket and not through an insurer." *Id.* at 234. The Court stated that this rate reduction "is not atypical and is representative of market value as it recognizes and helps to establish what constitutes a competitive fee within the local community." *Id.* The Court concluded that the trial court erred by determining that $450 (the partner's usual fee of $350 plus a $100 enhancement) was a reasonable hourly fee for the partner under these circumstances. *Id.* at 235, 241.

This Court in *Van Elslander* also considered the attorney fee awarded to the defendants' son, Dan Follis, Jr., who provided services to his parents free of charge. *Id.* at 236-237. The trial court concluded that Follis was entitled to attorney fees based on an hourly rate of $250. *Id.* at 236. This Court disagreed, opining as follows:

> It is difficult to justify the award as a sanction of fees for an individual who provided services that were agreed to be performed gratis. Such a result constitutes a windfall as it was not part of the billing to the Follises and, by definition, is something that goes beyond making the parties whole. The inclusion of fees for Follis borders on a punitive award, which is not the intent of the court rule and violates the *Smith* Court's admonition that the court rule "is not

> designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls." [*Id.* at 237, quoting *Smith*, 481 Mich at 528.]

This Court remanded the case to the trial court to reconsider the amount of attorney fees to be awarded as case-evaluation sanctions. *Id.* at 237-238.

Contrary to what plaintiff argues, the record discloses that the trial court here considered the various *Wood* and MRPC 1.5(a) factors in determining whether the $30 hourly fee actually charged was a reasonable attorney fee. Although the trial court did not explicitly refer to each *Wood* and MRPC 1.5(a) factor, its discussion addressed the relevant factors. The court noted that plaintiff's counsel was an experienced attorney with knowledge of the law but an inexperienced litigator, which caused the proceedings to become protracted. The court commented that the issue whether plaintiff had a contractual right to plant soybeans on the property was a relatively simple issue. These comments are pertinent to the first through fourth *Wood* factors and the first and seventh MRPC 1.5(a) factors. The trial court strongly emphasized that counsel himself testified that the $30 hourly rate was reasonable in view of the surrounding circumstances and further emphasized that the hours listed in his affidavit were reasonable. Plaintiff's expert corroborated counsel's opinion regarding the number of hours. Under these circumstances, the trial court did not abuse its discretion in determining that $30, the hourly rate actually charged, was a reasonable attorney fee for purposes of awarding case-evaluation sanctions. See *id.* at 232-237. We note that case-evaluation sanctions are compensatory in nature; the sanction's purpose is to shift fees to a party who rejects case evaluation, thus prolonging the proceedings, without achieving a more favorable result. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 528-529; 664 NW2d 263 (2003). The trial court acted in accordance with these principles when it compensated plaintiff for the expenses he actually incurred as a result of Dugan's rejection of the case-evaluation award.

We also reject plaintiff's argument that the trial court's compelled disclosure of his attorney-fee agreement and billing records violated the attorney-client privilege. We note that plaintiff did not rely on the attorney-client privilege as a basis for precluding discovery of these documents below but, instead, only argued that they were not relevant to determining a reasonable attorney fee. Therefore, the attorney-client privilege issue is not preserved. Accordingly, our review of this issue is limited to plain error affecting plaintiff's substantial rights. See *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 738; 832 NW2d 401 (2013).

'"The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice.'" *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 77 (2011), quoting *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618-619; 576 NW2d 709 (1998). In *US Fire Ins Co v Citizens Ins Co of America*, 156 Mich App 588, 593; 402 NW2d 11 (1986), this Court held that the attorney-client privilege did not shield an attorney-client fee agreement from discovery because "communication with [the attorney], specifically as it related to the fee agreement, cannot be construed as in the nature of seeking legal advise [sic]." Plaintiff did not argue below, and has not established on appeal, that the attorney-fee agreement and billing records constituted confidential communications for the purpose of obtaining legal advice. Therefore, plaintiff has not demonstrated that the trial court's decision to compel production of

these documents, which were relevant to the determination of a reasonable attorney fee, was plain error.

Plaintiff lastly argues that the trial court erred by denying his request for case-evaluation sanctions for the attorney fees incurred in the proceedings to obtain case-evaluation sanctions. We disagree.

In *Haliw v Sterling Hts*, 471 Mich 700, 711; 691 NW2d 753 (2005), our Supreme Court held that "appellate attorney fees and costs are not recoverable as case evaluation sanctions under MCR 2.403(O)." The Court observed that MCR 2.403(O) is "trial-oriented" because it focuses on expenses incurred between the time of the case evaluation and the verdict. *Id.* at 707-708. The Court explained in a footnote:

> [I]n support of our conclusion that MCR 2.403(O) is trial-oriented, we note that a request for case evaluation sanctions must be made within twenty-eight days after entry of judgment, MCR 2.403(O)(8), generally a time before the bulk of appellate fees and costs have been incurred. In addition, MCR 2.403(O)(6)(b) allows recovery of attorney fees 'necessitated by' the rejection of the case evaluation. While a causal nexus plainly exists between rejection and trial fees and costs, the same cannot be said with respect to rejection and the decision to bring an appeal. Rather, appellate attorney fees and costs are arguably "necessitated by" a perceived erroneous trial ruling.
>
> We are cognizant of prior decisions of the Court of Appeals that have construed the phrase "necessitated by the rejection" as a mere temporal demarcation. See, e.g., *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 235; 486 NW2d 68 (1992). On the basis of the language of MCR 2.403(O), however, we believe the better-reasoned approach goes beyond a temporal demarcation and requires a causal nexus between rejection and incurred expenses. [*Id.* at 711 n 8.]

However, MCR 2.403(O) does not preclude an award of attorney fees incurred in post-judgment proceedings where there is a sufficient causal nexus between the post-judgment proceedings and a party's rejection of a case-evaluation award. See *Young v Nandi*, 490 Mich 889; 804 NW2d 316 (2011); *Troyanowski v Kent City*, 175 Mich App 217, 227; 437 NW2d 266 (1988).

In this case, we do not believe that the proceedings relating to a determination of case-evaluation sanctions were causally connected to defendants' rejection of case evaluation. The focus of the case-evaluation proceeding involved the determination of a reasonable hourly rate when a party's attorney charged an actual rate significantly lower than his normal rate. The determination of this issue was not causally related to defendants' rejection of case evaluation. Accordingly, the trial court did not err by refusing to award case-evaluation sanctions for the attorney fees incurred in the proceedings to obtain case-evaluation sanctions.

Long argues on cross-appeal that if this Court determines in Docket No. 304653 that she was entitled to a directed verdict at trial, then the award of case-evaluation sanctions in favor of

David, which was premised on the jury's verdict against Long at trial, must be vacated. However, because we are affirming the jury's verdict, Long is not entitled to this requested relief.

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro